(2)

No. 04-249

IN THE

Supreme Court of the United States

CHADWICK E. WELLS, PETITIONER

v.

CITY OF ALEXANDRIA; JOHN HAMERNICK; WILLIAM GERARD ALWELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

I. The Court of Appeals correctly affirmed the District Court's grant of summary judgment in favor of the **CITY OF ALEXANDRIA, WILLIAM GERARD ALWELL,** and **JOHN HAMERNICK** when no evidence existed to support **WELLS'** claim regarding an alleged Louisiana state intentional tort claim.

II. The Court of Appeals correctly noted that the record references submitted in support of the **CITY, ALWELL,** and **HAMERNICK'S** motion for summary judgment contained the medical records of **WELLS'** treating physician Dr. Pope, and as such, no new evidence was submitted at oral argument which prejudiced **WELLS.**

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SUMMARY OF ARGUMENT

WELLS' claims of constructive discharge cannot be sustained when he voluntarily left employment with the **CITY**, and sought employment in Alabama one (1) year prior to his knee surgery. **WELLS** was never restricted from performing maintenance work at the **CITY** power plant until he complained to his treating physician that he did not want to do the work in August 2000. **HAMERNICK** and **ALWELL's** collective knowledge of **WELLS** jumping from boats, running down stairs, and performing his job duties without restriction after his February 2000 knee surgery, led them to believe that he could perform his job. **WELLS** first complained that he could not strip and wax the turbine floor after he had been assigned this duty, along with the other plant operators in August 2000. Because **WELLS** never complained or showed any sign of disability, and had a full duty work release from his treating physician in March 2000, neither **HAMERNICK** or **ALWELL** had any reason to believe that he could not perform his job.

No intentional tort occurred when **HAMERNICK** and **ALWELL** required **WELLS** to do his job. Neither **HAMERNICK** or **ALWELL** expressed any "conscious desire" to injure **WELLS**, through direct or circumstantial evidence. Despite seventeen (17) depositions being taken of current and former employees and co-workers of **WELLS**, none of them expressed any firsthand knowledge of ill will directed from **HAMERNICK** and **ALWELL** towards **WELLS**. The evidence that **WELLS** was released to perform all of his job duties by his treating physician was properly considered by the district judge when he granted the defendants' motion for summary judgment. As such, the court of appeal properly upheld the district judge's decision, and **WELLS'** claims should be dismissed, and his application for writ not considered.

STATEMENT

On August 16, 2001, plaintiff-appellant Chadwick E. Wells (hereinafter "**WELLS**"), a former Operator II employee at the City of Alexandria (hereinafter "**CITY**") Electrical Power Plant, filed a Petition for Damages in the Ninth Judicial District Court, Parish of Rapides, State of Louisiana, alleging claims under the Americans with Disabilities Act (hereinafter "ADA"), the Civil Rights Act, Louisiana State intentional tort law and a violation of the State whistleblower act. **WELLS** also demanded attorneys fees. Since **WELLS'** "Petition for Damages" revealed diversity of citizenship, and made federal claims, it was timely removed to the United States District Court for the Western District of Louisiana-Alexandria Division.

WELLS' Petition alleged that William Gerard Alwell (hereinafter "**ALWELL**") Plant Superintendent at the City Power Plant, and John Hamernick (hereinafter "**HAMERNICK**") Plant Chief Operator, engaged in acts that created a hostile work environment. **WELLS** alleged that workplace harassment occurred when he returned to work after undergoing knee surgery, in retaliation for Wells' reporting **ALWELL's** alleged unlawful conduct of stealing **CITY** roofing material to the Louisiana State Police. **WELLS** claimed that the harassment caused him to miss a physical therapy appointment. **WELLS** further alleged that he suffered pain from being forced to perform physically demanding work assignments, such as stripping and waxing floors, cleaning the "~~hot~~ well" area of the plant, and checking for air leaks in the condenser units. **WELLS** alleged that **HAMERNICK** and **ALWELL's** acts caused him to re-injure his knee, and experience additional pain and suffering.

The **CITY**, **HAMERNICK** and **ALWELL**, filed Motions for Summary Judgment, contending that **WELLS'** claims had no merit. Attached to defendants' Motions were

the depositions of **WELLS**; **ALWELL**; **HAMERNICK**; Kenneth Michael Ellison, **WELLS'** City of Tuscaloosa, Alabama, Supervisor; Pamela Saurage, City Personnel Director ("Saurage"); and A.E. "Sonny" Craig, City Director of Utilities ("Craig"). Additionally, excerpts from both **WELLS'** City Personnel File and his City of Tuscaloosa Personnel File were included with the defendants' Motions for Summary Judgment. Finally, the **CITY** attached the depositions of **WELLS'** co-workers David A. Reed, Larry McGuirt, Keith White and Floyd McFarland to its Reply Brief filed in response to **WELLS'** opposition to the defendants' Motions for Summary Judgment. These additional depositions were also adopted by **ALWELL** in reply to **WELLS'** argument.

On July 15, 2003, United States District Judge F.A. Little, Jr. granted defendants' Motions for Summary Judgment, dismissing all of **WELLS'** claims. Judge Little, in his Reasons for Judgment, held that **WELLS** had abandoned his ADA claim and any alleged state law disability claims. Judge Little dismissed **WELLS'** retaliation claims since he did not follow state law requirements for reporting the alleged violation. Judge Little also dismissed **WELLS'** intentional tort claims made under Louisiana law, finding that the intentional tort exception to the Louisiana Workers' Compensation Act did not apply. Judge Little further denied **WELLS'** claims for constructive discharge, because the complained of incidents occurred over a six (6) month time period, and were not so intolerable that a reasonable employee would feel compelled to resign.

Finally, Judge Little held that because **HAMERNICK** and **ALWELL** did not commit any tortious act, that the **CITY** was not vicariously liable for their actions.

WELLS filed a Notice of Appeal of Judge Little's ruling on July 30, 2003. After oral argument was granted and

heard on April 6, 2004, by the United States Court of Appeal for the Fifth Circuit, a decision affirming the District Court's grant of summary judgment was rendered on April 19, 2004. **WELLS'** petition for rehearing was denied on May 24, 2004. **WELLS** now seeks a writ of certiorari from this Court pursuant to 28 U.S.C. Section 1254(1).

CLARIFICATION OF THE RECORD

The record evidence considered by the district court clearly showed that no intentional conduct could reasonably be attributed to **ALWELL, HAMERNICK** or the **CITY**.

DAVID A. REED

David Reed, friend and co-worker of **WELLS**, testified that approximately one year prior to **WELLS'** surgery in February of 2000, he sought employment in Alabama, where his wife's family lived. Reed further testified that after **WELLS'** surgery, but prior to the alleged intentional acts performed by **HAMERNICK** and **ALWELL, WELLS** continued seeking employment in Alabama. Reed further testified that he personally knew that City Plant Operators, including **WELLS,** expressed opinions to **HAMERNICK** and **ALWELL** that they should not be forced to perform maintenance type work at the Power Plant. Reed further testified that **WELLS** never told him that his knee was injured before the surgery, or told supervisors that his injured knee prevented him from performing maintenance work at the Plant in Reed's presence.

Reed further testified that when he got sick at work he was allowed to go home and was not fired by **HAMERNICK** and **ALWELL.** Reed testified that he had personally seen other Plant Operators, including Jerome Woods and Lloyd

Fuqua, strip and wax the turbine floors at the Plant. Reed testified that the turbine floor needed to be stripped and waxed on a periodic basis, and when the Plant janitor, Charles Smith worked for the **CITY**, he would perform these tasks. Reed further testified that when Janitor Smith retired, the janitor position at the City Power Plant was not filled, and Plant Operators helped perform maintenance work.

KEITH WHITE

Keith White, Shift Supervisor of City Plant Operators, admitted in deposition that he reported **ALWELL** to the Louisiana State Police for the alleged theft of roofing material, and that the investigation proved that the charges were unfounded. White further testified that there was nothing wrong with Operators performing maintenance at the City Power Plant, and in fact all the Operators had performed it at some point or another. White also testified that he told **ALWELL** that he had been the person who reported the alleged thefts to the Louisiana State Police and that he suffered no retaliation from anyone thereafter.

LARRY MCGUIRT

Larry McGuirt, Instrument Technician at the City Power Plant, testified that he did not know anything about **WELLS** getting off work to go to physical therapy. McGuirt also knew nothing about **WELLS** being required to work in the hot wells. McGuirt testified that he knew nothing about **WELLS'** inspecting or cleaning the condenser units. McGuirt further testified that he never heard **HAMERNICK** and **ALWELL** make derogatory comments about **WELLS** in his presence or in anyone elses presence at the Plant. McGuirt further testified that **WELLS** never showed him a swollen leg.

FLOYD MCFARLAND

Floyd McFarland, **CITY** Power Plant Operator and friend of **WELLS**, testified that he deer hunted with **WELLS** in a "box stand" two or three times after his surgery, that **WELLS** killed a deer on one of those hunts, and suffered no perceived ill effects. McFarland stated that he never heard **ALWELL** or **HAMERNICK** make derogatory comments about **WELLS.** McFarland testified that as an Operator I, he waxed the turbine floor, although he had never stripped it. McFarland testified that maintenance personnel cleaned the hot well, but that the Operators were asked to help them at times. McFarland testified that when **WELLS** killed the deer, McFarland loaded it onto his four-wheeler rack and cleaned the deer, because Wells was too lazy to clean it.

McFarland testified that he painted at the Power Plant using a brush and rollers, and that no one was trying to punish him when he drew that duty. McFarland testified that when an operator drew hot well cleaning and condenser check duty, it was purely luck of the draw. McFarland testified that rules at the City Power Plant did not allow an Operator to leave the Plant at lunch time, and when the supervisors allowed Operators to leave for lunch, that that was a "nice thing".

WELLS' MISSTATEMENTS OF FACT

While petitioner makes much of the one occasion where he was not allowed to leave the Plant and attend physical therapy, he does not mention the numerous occasions where **HAMERNICK** and **ALWELL** accommodated his requests to attend physical therapy, and did not deduct sick or annual leave time from **WELLS** when he attended those appointments. **WELLS** fails to inform the Court that on the only day that he was denied a request to attend physical therapy on 15 minutes notice, that no Plant

Operator was present or available to replace him in the Control Room, where "million of dollars" of equipment required monitoring. **ALWELL** further testified that until this litigation was initiated and he saw the State Police investigation file, he did not know that **WELLS** had instigated the State Police investigation. **WELLS'** allegations of threatened termination for refusal to strip and wax the turbine floor, inspect the condenser tubes, and clean out the hot wells is without **any** factual support from any other Power Plant employee.

In fact, **WELLS** worked overtime as an Operator I when ordered by his Shift Supervisor to strip and wax the turbine floor. When **WELLS** declined the assignment, **HAMERNICK** and Utilities Superintendent A.E. "Sonny" Craig, told **WELLS** to do the work or go home. At no time was **WELLS** ever threatened with termination. **WELLS** was only being told that if he could not do the work, the **CITY** did not want **WELLS** to stay at work, as he was on overtime and being paid time and one half. Regarding the other maintenance chores of inspecting the condenser tubes and cleaning the hot well area of the plant, **WELLS'** co-worker Floyd McFarland testified that when an operator drew this duty, it was purely "luck of the draw" and not punishment.

Further, **WELLS** unsuccessfully attempted to bring a whistleblower action against **HAMERNICK** and **ALWELL** for their removal of scrap roofing material from the City Power Plant. Plaintiff cited *La. R.S. 42:1115(B)* for support that a prohibition only exists for the acceptance of gifts which amount to "anything of economic value". The scrapped roofing materials that had been left at the Plant had no economic value. More importantly **ALWELL** and other power plant employees had been told by the roofing contractor to remove any of the roofing material, otherwise it would be thrown out. The Louisiana State Police did not find a violation of the law, and the Rapides Parish District

Attorney never brought any criminal charges against **HAMERNICK** and **ALWELL.** The allegation that if Director of Utilities, Sonny Craig, had been contacted about this alleged theft that nothing would have occurred, is simply without any factual support in the record. The facts to which all witnesses have testified defeat the plaintiff's claim.

HAMERNICK and **ALWELL** asked Shift Supervisors to have **WELLS** and other Plant Operators perform maintenance work, which were duties contained in their Operator II job description. Other Operator II's have testified that they performed similar work without complaint. On the occasion that **WELLS** stripped and waxed the turbine floor, the work had already been started by Jerome Woods, current Shift Supervisor and Operator II at the time. On that occasion, **WELLS** worked overtime as an Operator I, which required him to perform the maintenance work six (6) months post knee surgery, of which he now complains.

No improper conduct was proved on the part of the defendants, **HAMERNICK** and **ALWELL**, and no vicarious liability against the **CITY** could be maintained. If any retaliation existed in this case, it would be the retaliatory lawsuit filed by **WELLS** after he voluntarily left employment with the **CITY** for a job with the City of Tuscaloosa, Alabama, that he sought one year before his knee surgery and before the alleged retaliatory acts of **HAMERNICK** and **ALWELL**. The testimony of his former supervisor in Alabama, Mr. Kenny Ellison, put it best when he stated that "Chad Wells wanted to be the boss".

NO CONSTRUCTIVE DISCHARGE OCCURRED WHEN WELLS VOLUNTARILY LEFT EMPLOYMENT WITH THE CITY

WELLS indicated in his separation paperwork with the **CITY** that he was relocating to Alabama for a better job.

No allegation that **HAMERNICK** and **ALWELL** did anything improper was made at or before April, 2001, when **WELLS** left the **CITY**'s employment. Cases have held that when an employee is simply required to perform his clearly enumerated job duties, and either refuses to do them, or voluntarily resigns, then no constructive discharge has taken place. *Elsensohn v. Farrington Productions, Inc., 840 So. 2d 611, 619-620 (La. App. 4 Cir. 2003).* Support for this factual conclusion is found in the testimony of **WELLS**' friend and co-worker David Reed, who testified that **WELLS** began looking for employment in Alabama one year prior to his surgery in February, 2000, and prior to the first alleged retaliatory act taken by **HAMERNICK** and **ALWELL** in August 2000.

The **CITY's** personnel policy required that an employee be able to perform ninety (90%) percent of the duties outlined in his or her job description, "without limitations" before returning to work. The November 25, 1997, Memorandum from Mayor Randolph and City Attorney Charles Nunnally further requires that a doctor review the employee's job description and provide written confirmation that he is able to perform the enumerated duties. The Memorandum further provides that "there are no exceptions in this policy". Additionally, it requires as an essential function that an Operator I "paints and cleans equipment in plant to maintain plant appearance and operation" and perform maintenance tasks and assist the maintenance crew in the inspection, overhaul, and repair of turbine generators and auxiliary equipment." Physical requirements of the job of an Operator I enumerated by OSHA/ADA Code 4 are defined as follows:

> "4. Task involves the regular, and at times sustained, performance of heavier physical tasks such as walking over rough or uneven surfaces, bending, stooping, working in

> confined spaces, and lifting or carrying moderately heavy (20-50 pound) items and occasionally very heavy (100 pounds or over) items; or may involve the complex operation of gasoline, electric, or diesel-powered machinery or shop equipment requiring the manipulation of multiple controls, fine adjustments or both: or the sustained operation, on a production basis, of such devises as offset presses with associated equipment."

When Dr. Pope released **WELLS** to return to work on or about February 28, 2000, he wrote on the bottom of the letter from Pam Saurage as follows:

> "Patient, Chad **WELLS** is able to return to work @ City of Alex. As an Operator II @ 90% of Pt's job duties."

Only after **WELLS** decided that he did not want to strip and wax the turbine floor did he go back to Dr. Pope in August of 2000, and obtain the additional restrictions contained therein. Dr. Pope wrote on the bottom of his "Treatment/Restriction Report" dated August 16, 2000, "Okay for normal Operator II avoid constant maintenance, prolonged standing & janitorial duties." This alleged restriction clearly came at **WELLS'** insistence that he did not want to perform maintenance work, but had not been an issue since his release to return to work in late February 2000, after his surgery, through August of 2000.

Petitioner does not mention that **HAMERNICK's** comment that he should go home if he didn't strip and wax the floor came when **WELLS** was working overtime as an Operator I, which required such maintenance duties. Some **CITY** employees, including Darren Sigur, expressed their

"opinion" that maintenance duties were not part of an Operator II's job. However, none of these employees brought a union or civil service grievance to correct this alleged discrepancy, nor could they deny that the phrase contained in the job description of an Operator II, required them to "perform other work as requested".

REASONS FOR DENYING THE WRIT

I. WELLS HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." *Sup. Ct. R. 10.* "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* **WELLS** has not presented any compelling reason for this Court to exercise its discretionary jurisdiction over the dismissal of his claim. Indeed, his key complaint, that the courts failed to give any weight to petitioner's contradictory evidence, was squarely addressed and dismissed by both the District Court and the United States Fifth Circuit Court of Appeal.

WELLS' attorney cites *Bazley v. Tortorich 397 So. 3d 475, 481 (La. 1981)* to discuss Louisiana law on intent. The *Bazley* case involved an employee who was struck by an automobile as he was mounting the back of a garbage truck during the course of employment. The plaintiff alleged that the accident was caused by his co-employee's intentional acts in operating a garbage truck without a working horn. Ultimately, the Supreme Court defined "intent" as follows:

> "that person who acts either (1) consciously desires physical result of his act, whatever likelihood of that result happening from his

> conduct, or (2) knows that result is substantially certain to follow from his conduct, whatever his desire may be as to that result."

In *Bazley* the Supreme Court held that failure to blow a horn did not rise to the level of an intentional act. **WELL's** interpretation of *Bazley* is misplaced because it does not differentiate between intentional acts and the failure to perform an affirmative act. **WELLS** interpretation of *Bazley* also ignores the Louisiana intentional act exclusion from Worker's Compensation matters. **WELLS'** attorney cites *Benoit v. Capitol Manufacturing Co., 617 So. 2d 477 (La. 1993)* and *Caudle v. Betts, 512 So. 2d 389, (La. 1987)* attempting to address cases where an employer was held to have consciously desired the physical harm resulting from his conduct. The standard enunciated by the Louisiana Supreme Court involved a "conscious desire" for the physical result to follow the act, or knowing that the result is "substantially certain" to follow from the conduct. *Reeves v. Structural Preservation Systems, 731 So.2d 208 (La. 1999)* In *Benoit*, two employees were involved in a fight while at work. An employee brought suit against the co-employee and employer seeking to recover for co-employee's alleged intentional tort. The plaintiff was intentionally injured by his co-employee in the course and scope of his employment and the employer was held vicariously liable for that intentional tort . In the case at bar, **WELLS** was not involved in a workplace fight. The evidence showed that **WELLS** was not intentionally injured by **HAMERNICK** or **ALWELL** when they merely instructed him to do his job, and the **CITY** was not held vicariously liable because no improper conduct occurred. In *Caudle* an employee sued his employer and its chief executive officer for injuries sustained when the CEO administered an electrical shock to the employee as a practical joke. This case is significantly different from

WELLS because no practical joke was played on **WELLS**, resulting in his injury. **WELLS** was simply required to perform his job, and did not want to do it.

WELLS' attorney offers the *Reeves* case for the proposition that "an employee may sue his employer in tort for injuries that result from an intentional act." In *Reeves* the plaintiff sued his employer and co-worker, alleging that injuries sustained from moving a 400 pound sandblasting pot were caused by his employer's intentional acts. In the case at bar, **WELLS'** supervisors ordered him to perform his job. **WELLS'** took issue with the scope of his job duties which should have been taken up in the form of a Civil Service grievance. In *Reeves,* the employer allegedly committed an intentional act within the meaning of the Workers Compensation intentional act exception by directing an employee to manually perform a procedure normally prohibited by OSHA safety regulations, and which the employee's supervisor feared would eventually lead to his injury. **WELLS** produced no testimony or evidence that **ALWELL** or **HAMERNICK** directly participated in any of the acts which allegedly caused his physical injury, and pursuant to the reasoning in *Reeves*, even if they did, there is no liability.

WELLS' attorney also cites *Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)* for the proposition that lower courts should not make credibility determinations and weigh the evidence when ruling on Rule 50 motions or motions for summary judgment. In *Reeves*, a discharged employee sued his former employer, alleging age discrimination in violation of Age Discrimination in Employment Act. This case is distinguishable from the case at bar because credibility was never the issue. The actions and evidence never showed that two different opinions on a relevant issue entered the summary judgment consideration. **WELLS** was released to perform full duty work on March 17, 2000, by his treating

Orthopaedic surgeon, Dr. Pope. **WELLS** was assigned the stripping and waxing of the turbine floor on August 2000. Not until **WELLS** drew the less desirable duty of stripping and waxing did he return to Dr. Pope seeking additional job restrictions. Clearly, no intent inquiry was necessary by the trial court.

WELLS' attorney cites *Hunt v. Cromartie, 526 U.S. 541 , 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999),* for the proposition that a disputed fact concerning motivation cannot be resolved at the summary judgment stage. In *Hunt*, North Carolina residents sued various state officials challenging North Carolina's congressional redistricting plan as being racially motivated in violation of the Equal Protection clause. The Court in *Hunt* held that the issue of racial gerrymandering could not be decided on a motion for summary judgment.

> The tack of assessing a jurisdictions motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Hunt 526 U.S. 541, 546* quoting *Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).*

Surely, this Court distinguishes between a disgruntled plant operator and State Legislators intentionally gerrymandering Congressional election districts.

WELLS' attorney relied on the case of *International Shortstop, Inv. v. Rallys Inc., 939 F. 2d 1257, 1265-66 (5th Cir. 1991), Cert Den. 502 U.S. 1059, 112 S. Ct. 936, 117 L. Ed. 2d 107 (1992)* for the proposition of why summary judgment is usually inappropriate concerning issues of state

of mind. In *International Shortstop* the owner of a fast food restaurant sued a competitor in Texas state court alleging that the competitor's trade-dress infringement action brought against the corporation was filed in bad faith and constituted tortious infringement. The issue in *International Shortstop* was whether discovery had been completed prior to the hearing of the motion. In the case at bar, **WELLS** participated in seventeen (17) depositions before the motion for summary judgments were filed. Surely he cannot argue that discovery was not complete prior to the hearing on the motion.

WELLS' attorney cites the *In Re: Combustion, Inc., 960 F. Supp. 1076, 960 F. Supp. 1076, 1081 (W.D. LA. 1997)* decision for the proposition that intent is a fact-sensitive determination not appropriately determined in a motion for summary judgment. In the *Combustion* case, summary judgment was denied because a fact issue existed about whether the insureds' pollution damage was caused by the intentional acts of the alleged polluters. That "fact" sensitive issue could not be determined on a motion for summary judgment. In the case at bar, the District Court had the benefit of reviewing seventeen (17) depositions to determine all parties actions, regardless of their intent. Clearly the actions of **ALWELL** and **HAMERNICK** in requiring **WELLS** to perform his job did not rise to the level of an intentional tort.

WELLS' attorney also relied on *Bruce v. Cleggett-Lucas, M.D., 2003 WL 1733530 (E.D. La. 2003)* , for the proposition that summary judgment is seldom appropriate for determinations based on subjective facts, such as motive, intent, good faith, knowledge and malice. In *Bruce,* a plaintiff filed suit alleging that he sustained injuries as a result of the ingestion of and addiction to OxyContin, a narcotic prescription medication. The defendant doctors motion for summary judgment was denied because other issues raised implicated factual questions which could not be

determined on a motion for summary judgment. This case does not apply to **WELLS** because it dealt with material issues of fact in dispute with respect to when the plaintiff's medical malpractice claim accrued. In such circumstances, summary judgment may well be inappropriate. In the case at bar however, no such accrual of a cause of action was at issue. **WELLS**' shifting theories of liability including the Americans with Disabilities act, the Civil Rights Act, a violation of the Louisiana Civil Code of Ethics and the Whistleblower Act, all failed to raise any genuine issue of fact that would have precluded the grant of a summary judgment.

WELLS' attorney also cites *Swope v. Columbian Chems Co., 281 F 3d 185 (5th Cir. 2002),* in which the Fifth Circuit reversed a summary judgment in favor of the employer in a Louisiana intentional tort case in light of competent evidence of intent. In *Swope*, a maintenance worker and his wife sued the employer-chemical company and brought a products liability claim against a successor manufacturer of the employer's ozone generators, for lung damage allegedly sustained during inhalation of ozone. The genuine issue for trial was whether a purchaser already knew or reasonably should have known of the product's dangerous characteristics and whether [an adequate] warning was provided. In the case at bar, no evidence existed that **HAMERNICK** and **ALWELL** knew to a substantial certainty that they were causing **WELLS** to re-injure his knee simply by requiring him to perform his job.

The *FDIC v. Laguarta, 939 F 2d 1231 (5th Cir. 1991),* discussion involved an interpleader action removed to federal court where the FSLIC asserted a counterclaim against a borrower, and the FDIC was substituted as a party. In the *FDIC* case, summary judgment was denied because of the lack of evidence demonstrating that Liberty did not default by failing to advance requested funds. Similarly in the case at bar, **WELLS** did not present any evidence that **ALWELL** or

HAMERNICK intended to harm him by merely assigning him tasks that were part of his job duties.

Further, **WELLS'** attorney misstates this Court's holding in *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, L. Ed. 2d 202 (1986)*, in which this Court held:

> "By its very terms this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."
> "The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."
> "It is the substantive law's identification of which facts are critical and which facts are irrelevant that governs."
> "A party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but... must set forth specific facts showing that there is a genuine issue for trial."

In addition, this Court in *Celotex Corporation v. Catrett, 106 S. Ct. 2548, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* held:

> If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of

> law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).*

Furthermore, this Court in the *Matsushita Electric Industrial Co.,v. Zenith Radio Corporation, et al 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, case held:

> "When the moving party has carried its burden under Rule 56 (c), the opponent must do more than simply show that there is some *metaphysical doubt* as to the material facts. *Deluca v. Atlantic Refining Co., 176 F. 2d 421, 423 (CA2 1949).*
> In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.'* Fed. Rule Civ. Proc. 56 (e).
> The purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial'. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' *Cities Service, supra, 391 U.S., at 289, 88 S. Ct., at 1592.*

WELLS' evidence in opposition to the defendants' motions for summary judgment should raise more than a "metaphysical doubt" about a material fact. Seventeen depositions of parties and fact witnesses dispelled any doubt that a genuine issue of fact existed which would have precluded the grant of summary judgment. The cases cited by ***WELLS*** are inapplicable in the case at bar, since the facts in those cases are not analogous. In the *Anderson* case, a libel action was brought against a magazine company. This Court

denied Summary judgment in *Anderson* because actual malice issues require the trial judge to weigh the actual quantum and quality of proof necessary to support liability. No such weighing of proof was necessary in the case at bar because **WELLS** could produce proof of malicious intent from any party after taking seventeen (17) depositions.

WELLS' attorney also cites *Topalian v. Ehrman., 954 F 2d 1125, 1131, N. 10 (5th Cir. 1992), REH. DEN., 961 F. 2d 215 (5th Cir. 1992), CERT DEN., 506 U.S. 825, 113 S. Ct. 82 (1992)* which held that an appellate court's inquiry is limited to the summary judgment record before the trial court and parties may not advance new theories or raise new issues on appeal. In *Topalian* investors in an oil and gas limited partnership sued its general partners under federal securities statutes and RICO. Summary judgment was denied because the investors' securities claims were barred by limitations , and their allegations were insufficient to support RICO claims. No such RICO claims or federal securities issues existed in **WELLS.**

In summary, **WELLS** cites numerous cases out of context involving issues so complex that no judge would grant summary judgment on them. The easiest way to distinguish the case at bar from **WELLS'** cited cases is to consider that **WELLS** was simply trying to get out of doing his job, and that no evidence exists from which any judge could conclude that **HAMERNICK** and **ALWELL** committed any state law tort.

II. THE LOWER COURTS DID NOT ERR IN DECIDING THIS CASE

Summary judgment was properly maintained against **WELLS**. He failed to submit any evidence of any improper conduct on the part of the defendants, **HAMERNICK** and **ALWELL**, and hence no vicarious liability against the **CITY** can be maintained.

In addition, **WELLS** alleged a retaliation claim for reporting that **HAMERNICK** and **ALWELL** had taken roofing material for personal use. The U.S. Fifth Circuit agreed with the District Court that summary judgment on this claim was warranted. *La. R.S. 23:967* by its terms requires the employee to advise the employer of a violation of law before reporting it to outside authorities. No evidence existed that **WELLS** advised any official at the **CITY** of **ALWELLS'** alleged theft of roofing material.

WELLS' knee injury claim is governed strictly by Workers' Compensation Act *La. R.S. 23:1032.* No direct evidence existed that the **CITY, ALWELL** and **HAMERNICK** consciously desired that **WELLS** reinjure his knee or knew that this result was substantially certain to follow. **WELLS** was assigned unpleasant cleaning and maintenance assignments, and his request to leave the plant for a physical therapy appointment on fifteen (15) minutes notice was insufficient for a reasonable trier of fact to find that the **CITY, ALWELL** and **HAMERNICK** intentionally tried to re-injure **WELLS'** knee, or knew that an injury was substantially certain to follow from their conduct.

The **CITY, ALWELL** and **HAMERNICK** offered evidence that **WELLS'** job duties included cleaning the plant. The District Court noted that the three specific cleaning and maintenance assignments about which **WELLS** complained occurred during periods where his doctor's treatment/restriction reports state that his activities were unrestricted. [1] Evidence that **HAMERNICK** and **ALWELL**

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[1] Wells complained about cleaning and maintenance assignments he performed on August 11, 2000, February 3, 2001, and February 12, 2001. A February 28, 2000 doctor report limits his activities to "Light duty at 90%," but states that this restriction is only in effect until March 15, 2000. An August 16, 2000 report states that he should avoid "consistent maintenance, prolonged standing and janitorial duties," but a September 6, 2000 report states that these restrictions are only in effect until October 18, 2000.

were angry at **WELLS** or were motivated by a general desire to retaliate against him is not proof of a desire to physically injure **WELLS.** If the record as a whole could not lead a rational jury to find for the nonmoving party, there is no genuine issue for trial and summary judgment is warranted. *Capital Concepts Props. 85-1 v. Mutual First, Inc., 35 F. 3d 170, 174 (5th Cir. 1994).*

III. NO NEW FACTUAL ISSUE WAS PRESENTED BY DEFENDANTS ON APPEAL

In paragraph 2 of **WELLS'** Questions Presented for Review, he argues that the Court of Appeal erred in deciding a factual issue raised for the first time at oral argument of the appeal, when it was not presented to the district court. Specifically, **WELLS** argued:

> The Court of Appeals erred by:
> (a) allowing counsel for defendants to raise a new issue at oral argument that was not previously argued to the District Court;
> (b) denying petitioner the opportunity to offer evidence in response to that issue; and,
> (c) making a factual determination on that issue in support of its decision sustaining the District Courts' granting of respondents' motions for summary judgment.

Initially, it must be noted that this argument is apparently addressed to the Fifth Circuit's conclusion that:

> "We further note that the three specific

> cleaning and maintenance assignments about which Wells complains occurred during the period where his doctor's treatment/restriction reports state that his activities were unrestricted. [FN2]
>
> Footnote 2 states that:
>
> "Wells complains about cleaning and maintenance assignments he performed on August 11, 2000, February 3, 2001, and February 12, 2001. A February 28, 2000, doctor's report limits his activities to 'light duty at 90' but states that his restrictions only in effect until March 15, 2000. An August 16, 2000, report states that he should avoid "constant maintenance, prolonged standing & janitorial duties,", but a September 6, 2000, report states that these restrictions are only in effect until October 18, 2000."

It is important to note that the Fifth Circuit Court reached this conclusion on these facts taken directly from the Statement of the Facts submitted by the **CITY** and **ALWELL** in the brief submitted to the Court of Appeal. (See page 5 of **ALWELL'S** brief.) Further, the Statement of the Facts is drawn exclusively from exhibits submitted to the District Court jointly by the **CITY, ALWELL** and **HAMERNICK** , which were identified and cited as Exhibit C, **WELLS**' Personnel File with the **CITY**, page 133, and Exhibit F, Deposition of Pamela L. Saurage. Contrary to **WELLS**' argument, the record is replete with references made to these exhibits in pleadings and argument to both the lower courts. For example, in the **CITY**'s reply brief to **WELLS**' Opposition to the Motion for Summary Judgment, at pp. 8-9, reference is made to the reports of Dr. Pope, the

restrictions, and the dates of the reports and/or restrictions. Additionally, in the **CITY**'s original Motion for Summary Judgment reference is made to Dr. Pope's records, restrictions and the dates thereof. (See pp. 12, 24, 26 and 37 of the **CITY**'s Motion for Summary Judgment.) Further, in the Statement of Uncontested Facts submitted by **ALWELL**, at page 2, reference is made to Dr. Pope's report of February 28, 2000, which stated that **WELLS** was to return to work as an Operator II on March 8, 2000. (See pp. 2 and 5 of the Statement of Uncontested Facts.) Furthermore, specific reference is made to Dr. Pope, his reports and restrictions in **ALWELL**'s Memorandum in Support of Motion for Summary Judgment. (See pp. 6, 16, 18 and 27 of **ALWELL**'s Motion for Summary Judgment.)

In contrast to **WELLS'** bold argument that new questions of fact were raised on appeal, even a cursory review of **WELLS'** own deposition, the **CITY, ALWELL** and **HAMERNICK**'s pleadings, and **WELLS'** Opposition to the Motion for Summary Judgment reveal extensive briefing and discussion of Dr. Pope's reports and restrictions. (See also Plaintiff's Opposition to Motion for Summary Judgment, pp. 5 & 26.) Additionally, **WELLS** filed the office notes of Dr. Pope as Exhibit S and the questionnaire of Dr. Pope, changing limitations, dated August 16, 2000, as Exhibit T. Thus **WELLS'** claim that this was a "new" factual issue not previously raised until oral argument before the Court of Appeals is disingenuous and utterly contradicted by the record.

Finally, during the course of **WELLS'** oral argument, **WELLS'** counsel made factual assertions that the instructions given by **ALWELL** and/or **HAMERNICK** violated Dr. Pope's restrictions. In response to **WELLS'** incorrect factual argument that Dr. Pope's restrictions were violated, the panel of judges for the Fifth Circuit were informed that these statements were erroneous and their

attention was directed to the exhibits referenced in the Statement of the Facts contained in the Briefs of the **CITY** and **ALWELL** and attached as brief appendices. (See pp. 5-6 of the Statement of the Facts and the specific exhibits referenced therein.)

In summary, **WELLS'** argument at the Fifth Circuit was contradicted by the exhibits in evidence. When this contradiction was brought to the Fifth Circuit panel's attention, it was apparently deemed significant, as indicated in the April 29, 2004, ***per curiam*** denial of **WELLS'** appeal. The Fifth Circuit's reference to the undisputed evidence submitted by **CITY, ALWELL** and **HAMERNICK** and **WELLS** is nothing more than a refutation of **WELLS'** argument that Dr. Pope's restrictions were somehow violated by the actions of **ALWELL** and/or **HAMERNICK**. In other words, **WELLS** is now seeking a reversal on an issue his attorney raised at oral argument and which was resolved adversely to **WELLS** by the Fifth Circuit's review of the evidence submitted by all parties in the District Court. This should not be allowed.

CONCLUSION

No evidence existed that the **CITY, HAMERNICK** or **ALWELL** understood the exertion required to cause **WELLS** to re-injure his knee. **WELLS** did not specifically tell the officials of the **CITY** or **HAMERNICK** or **ALWELL** that the assignments would cause him to re-injure his knee. Both **ALWELL** and **HAMERNICK** testified that they thought **WELLS** could perform the assignments because **WELLS** had told him he could do the work and **HAMERNICK** had seen **WELLS** jump from the back of boats and run up stairs prior to making the work assignments.

Under modern summary judgment practice, "there is no issue for trial unless there is sufficient evidence favoring

the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).*

The lower courts appropriately ruled that **WELLS** failed to meet his burden of proof. **WELLS** presents no reason to reevaluate this decision. Moreover, his Petition cites no contrary or more recent authority to discredit the holdings of the lower courts.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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